No. 20415

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERWIN E. HASSEN,

Appellant,

vs.

SAM JONAS, Trustee of the Estate of Pomona Properties, Inc., doing business as STEVE'S RANCH MARKET, Bankrupt,

Appellee.

Appeal From the United States District Court for the Southern District of California Central Division.

APPELLANT'S OPENING BRIEF.

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A. STATEMENT AS TO JURISDICTION.

The United States District Court, Southern District of California, Central Division, is a Court of Bankruptcy within the jurisdiction of the United States Court of Appeals for the Ninth (9th) Circuit. [Sec. 24 of Bankruptcy Act—11 U.S.C.A. §47.]

On April 19, 1963, Appellee filed with the said United States District Court an "Application for Order Requiring Return of Converted Assets and to Set Aside Preferences and Fraudulent Conveyances." [Tr. pp. 34-41.]

Appellant filed his answer to said application on May 13, 1963. [Tr. pp. 42-45.]

On September 11, 1963 (after a hearing was had—before Hon. Russell Seymour, Referee in Bankruptcy (to whom this matter was referred)—on June 17 and 24, 1963 [See Transcript of June 17, 1963, hearing attached to Referee's Certificate on Application for Review of Order of December 11, 1964 [Tr. p. 115]), Appellee filed an amended Application. [Tr. pp. 57-62.]

Appellant filed an answer to this amended application. [Tr. pp. 63-67.]

Further hearings were held before the said Referee on November 13, December 11 and December 18, 1963, and on January 13, 1964. [Tr. p. 114, lines 3-5.]

On July 27, 1964, said Referee filed a Memorandum Opinion. [Tr. pp. 72-75.]

On December 11, 1964, said Referee signed and filed Findings of Fact and Conclusions of Law. [Tr. pp. 76-90.]

Appellant had objected to said Findings and Conclusions. [Tr. pp. 91-98.]

On December 11, 1964, said Referee signed and filed "Order Requiring Return of Converted Assets, etc." [Tr. pp. 99-101.]

On December 21, 1964, Appellant filed his Petition for Review (of said Order of December 11, 1964) with the said District Court. [Tr. pp. 102-110.]

On June 29, 1965, a hearing was held before Hon. William M. Byrne—Judge Presiding in said District Court. [Tr. Vol. II.]

On July 12, 1965, the said Hon. William M. Byrne filed his Order on said Petition for Review. [Tr. pp. 124-126.]

Appellant filed his Notice of Appeal to the above-entitled Court on July 16, 1965. [Tr. p. 127.]

Appellant filed his Statement of Points and Designation of Record. [Tr. pp. 128-134 (last 7 pages of Tr.).]

This Court has jurisdiction to entertain this appeal by virtue of the provisions of Sections 24 and 25 of the Bankruptcy Act [11 U.S.C.A. Secs. 47-48].

B. STATEMENT OF FACTS.

I.

Background.

About January 20, 1961, Pomona Properties, Inc. (called "Bankrupt") acquired a retail food store and business from McDaniel Markets (located in Inglewood, California). [Trustee's Ex. A.] Bankrupt commenced its business on January 30, 1961, and on February 24, 1961—about 25 days later—the Sheriff's office took possession and control of the premises and business (pursuant to a creditor's attachment). On March 1, 1961 (about 30 days after Bankrupt commenced business), an Involuntary Petition in Bankruptcy was filed against Bankrupt and Appellee took over (from the Sheriff) as Receiver (Appellee became Trustee upon adjudication on April 5, 1961). [Rep. Tr.* pp. 99, 108, 115-116 and Tr. pp. 2-5.]

Appellant filed claims against Bankrupt—for $42,000.00 and $60,000.00 (Both evidenced by promissory notes executed by Bankrupt—see Tr. p. 29, line 13, to p. 30, line 12]. [Creditor's Ex. 21 and Tr. p. 27, lines 13-29.] The Appellant objected to said claims and, after hearings, the Referee—treating said sums as "contribu-

*References are to Transcript of Proceedings before Hon. Russell B. Seymour, Referee.

tions to capital"—allowed said claims as "subordinated claims". [Exs. M and N and Tr. pp. 26-33.]

No appeal was taken from the Referee's Findings and Order of July 26, 1962 [Tr. p. 30, lines 14-26 and pp. 32-34] and thus the parties hereto are—Appellant respectfully submits—bound (*res adjudicata* or collateral estoppel—Rep. Tr. p. 5, lines 13-18] by the Court's Findings of July 26, 1962 [Paragraphs XII and XIII of said Findings], that:

(1) Appellant made "contributions of capital" to Bankrupt of said $42,000.00 and $60,000.00; and

(2) Appellant did *not* "sell or loan" (and thus Bankrupt did *not* incur an "indebtedness" therefor) anything to Bankrupt—represented by this $42,000.00 and $60,000.00 [Tr. p. 30, lines 14-26.]

On January 11, 1961 (about 20 days *before* Bankrupt commenced business), Appellant had caused six (6) notes and second deeds of trust (totaling $42,000.00) to be transferred to Bankrupt—which used the same to partially pay for about $55,000.00 (wholesale) of groceries, etc. (*i.e.,* inventory) sold to Bankrupt by McDaniels Market [Tr. p. 29, lines 13-19, and lines 31-32, and p. 30, lines 1-12].

Bankrupt—and its creditors—thus received a $42,000.00 benefit from Appellant. (As a matter of fact, under the—at least—25% "mark-up" [see Ex. S, pp. 2-3], the creditors benefited by about $52,000.00] *This sum was never repaid to Appellant because* the Referee "found" that Appellant had made a "contribution of capital" of this amount to Bankrupt.

On About February 2, 1961 (three (3) days after Bankrupt commenced business), Bankrupt gave Appellant a $60,000.00 promissory note [*to be paid when Bankrupt could*—with no down payment—see Exhibit M, p. 98, lines 1-10, and Rep. Tr. p. 213, lines 15-23] in exchange for a grant deed Appellant executed to Bankrupt (covering six (6) apartment buildings (of six (6) units each) located in Santa Ana, California) [Creditor's Ex. 4, and Tr. p. 29, lines 21-29, and p. 30, lines 14-19 and lines 28-32.]

(These Santa Ana apartment buildings were acquired —from Appellant—by Bankrupt—"subject to" (1) first deeds of trust for $25,000.00 (each apartment building) and (2) second deeds of trust for $7,000.00 (each apartment building)—the latter deeds of trust were acquired by McDaniels Market (from Bankrupt—who acquired the same from Appellant) as payment of $42,000.00 (6 X $7,000) of $55,000.00 of *wholesale* inventory (as aforesaid).)

On March 6, 1961, the Appellee reported Bankrupt still had about $80,000.00 of inventory (at retail—but about $57,500.00 at wholesale). [Ex. S, pp. 10-11.]

Appellant also notes that the "sheriff" had sold about $9,000.00 of inventory between February 24 and 26, 1961 [Ex. S, p. 8] and that Appellee had sold about $11,300.00 (and purchased about $4,500.00) of inventory between March 1-5, 1961. [Ex. S, p. 11 (middle of page).]

The Appellant also notes that the Appellee sold all remaining inventory, beer and wine license and sublease —about July 12, 1961—for about $27,500.00. [Tr. pp. 9-25.]

(It is also noted that except for the refusal of Eleanor Tavluian (*whom appellant understands to be Mrs. Dadigan* [Ex. M, p. 23, lines 12-18; p. 24, line 25; p. 25, lines 1-3; p. 127, lines 13-24]) to consent to the transfer of the lease—the Bankrupt would have realized return of six second deeds of trust (from McDaniels Market) plus $30,000.00 plus wholesale value of inventory minus $35,000.00 to be paid to McDaniels Market—Tr. pp. 9-22.)

Having disposed of Appellant's claims—by obtaining a Finding that they were "contributions to capital"—(and thus putting the creditors in a position where "they" had obtained the benefit of at least $42,000.00 ($52,000.00 in sales) of "free inventory") the Appellee then proceeded—*on April 19, 1963*—to seek a court order requiring Appellant to:

(a) Return $4,000 to $4,500 of rents—which Appellant admitted he collected from the Santa Ana apartments between March 2 and June, 1961 (at a time when Appellee was taking the position that he didn't know whether he was going to "recognize" the February, 1961, "sale" of the Santa Ana apartments by Appellant to Bankrupt —with Appellee finally *on November 2, 1961*, deciding that he could "recognize" the "sale", but *not* "recognize" the $60,000.00 "sale note"—See Ex. N, p. 11, lines 11-15; p. 13, lines 5-17; Ex. K];

(b) Return $20,000.00 which Appellant had obtained from Bankrupt—as a repayment of a $20,000.00 loan which Appellant had caused to be made to Bankrupt [Tr. p. 86, lines 18-30];

(c) Pay—*for a second time*—$28,000.00 which Appellant had withdrawn from Bankrupt's bank account on February 20, 1961—but returned to Bankrupt (*and its creditors*) and as follows:

(1) $14,000.00—on February 21, 1961;

(2) $8,000.00—on February 23, 1961;

(3) $8,000.00—on March 1, 1961.

[Tr. p. 74, lines 8-9, and p. 88, lines 19-21.]

The original theory of Appellee was that Appellant had to return the rents (collected *after* Petition in Bankruptcy filed—with knowledge of the bankruptcy proceedings) and the Appellee could recover the $20,000.00 and the $28,000.00 on the theory that Appellant had created "preferences"—*under Section 60 of the Bankruptcy Act*—which he could be made to return [see original Application for Order to Show Cause filed April 19, 1963—Tr. pp. 34-39].

At the June 17 and 24, 1963, hearings, *the Referee ruled that any action*— to set aside alleged preferences under Section 60 of the Bankruptcy Act—was barred by the two (2) year statute of limitations prescribed by Section 11(e) of the Bankruptcy Act. [Rep. Tr. pp. 24-33.]

In other words, the Court ruled that the fact that $20,000.00 and $28,000.00 was, in effect, paid to general creditors *before* bankruptcy (and thus a "preference" *might* have been given to *those* creditors over "creditors of the Bankrupt Estate") was immaterial

because the two (2) year statute of limitations (April 5, 1961—April 5, 1963) barred any action on the theory of "Section 60 preferences".

Then Appellee—on September 11, 1963—filed an *amended* application [Tr. pp. 48-62] and attempted to recover the $20,000.00 and $28,000.00 on the theory that:

(a) *Second Cause of Action* [Tr. pp. 59-60]. "Director's Preference" at time of insolvency within the purview of California cases (given to Appellee by Referee). [Rep. Tr. p. 33, lines 17-26, to p. 34, line 1.]

(b) *Third Cause of Action* [Tr. pp. 60-61]. Fraudulent transfer within California Uniform Fraudulent Conveyance Act. (Civil Code—§§3439 *et. seq.*).

The case then proceeded to trial—Rep. Tr. pp. 31 to end—(as to $20,000.00 and $28,000.00) with Appellee trying to prove:

(1) *Second Cause of Action.* Appellant (referee having "found" him to be person "in control" of Bankrupt [Tr. p. 28])—although Appellant was never a stockholder, officer or Director of Bankrupt [Ex. M, p. 41, lines 15-26, 54 and pp. 63-70, 75, pp. 80-82 and pp. 120-128]—in bad faith—to give himself a preference over other creditors—caused Bankrupt to pay him $20,000.00 at a time when Bankrupt was "insolvent" and Appellant knew this;

(2) *Third Cause of Action.* Appellant fraudulently (*i.e.,* to hinder, etc., creditors) transferred $28,000.00 to himself on February 20, 1961.

II.

General Facts.

(a) *The Collection of Rents by Appellant.*

On March 1, 1961, an Involuntary Petition in Bankruptcy was filed against Bankrupt. [Tr. pp. 2-5.] Appellee was appointed Receiver. [Tr. p. 9, lines 21-24.] On April 5, 1961, there was an adjudication of bankruptcy and on April 21, 1961, Appellee was appointed Trustee. [Tr. p. 77, lines 15-23.]

Between May 10, 1961, and June 15, 1961, Appellant collected $5,400.00 of rents from tenants of the Santa Ana apartments (which had been transferred to Bankrupt on February 7, 1961—see Creditor's Ex. No. 4 [Tr. p. 85, lines 20-27.].)

Demand was made—by Appellee—upon Appellant to return these rents on November 2, 1961 (between April 5 and November 1, 1961, Appellee would not give Appellant any final answer as to whether Appellee was going to recognize the February 7, 1961, transfer). [Ex. N, p. 11, lines 11-15 and p. 13, lines 5-17.]

Appellant admits collecting these rents, but contends that he is entitled to an "off-set" for the following amounts paid to—or for the benefit of—the Bankrupt or its creditors:

(1) $2,000.00 (of $8,000.00) paid on March 1, 1961 [Ex. N, pp. 19-21 and Rep. Tr. pp. 230-242];

(2) $2,199.95 paid between March 1 and 16, 1961 [Ex. N, pp. 21-22];

(3) $1,400.00 paid between May 16 and 25, 1961 (used to pay utility bills) (which the United States District Court *held* were used to pay

customers' utility bills, but Referee having given Appellant credit for only $900.00 [Tr. Vol. II, pp. 8-12, and p. 14, lines 9-11.].)

These rents were collected *after* Petition in Bankruptcy was filed and the amounts paid by Appellant (and claimed as an offset) were paid *after* said Petition was filed.

There is no conflict whatsoever as to the facts that (1) Appellant collected the $5,400.00 of rents and (2) Appellant actually repaid $5,599.95 and (3) that such collections and repayments occurred *after* Petition in Bankruptcy (and at the time Appellee was Receiver or Trustee—Tr. p. 77, lines 20-23] was filed herein. [Ex. N, pp. 18-24, Creditors' Exs. 9 and 12, Exs. I and J and Ex. M, pp. 136-162.]

The Referee found [Tr. p. 85, line 28] that the $900.00 of rent collected on May 16, 1961, was used to pay customers' utility bills and allowed this "as an offset"—but refused to allow the $400.00 and $100.00 [May 17 and 25, 1961—Tr. p. 85, lines 25-26] of rent collected to be offset. [Tr. p. 85, lines 28-31.] However, the United States District Court reversed the Referee on this point and allowed said $400.00 and $100.00 to be used as "off-sets". [Tr. Vol. II, p. 9, lines 16-25; p. 14, lines 9-11 and Tr. p. 125.]

The Referee found that $8,000.00 (of the $28,000.00 taken on February 20, 1961) was paid back by Appellant on March 1, 1961—the day the bankruptcy petition was filed herein and Appellee was appointed Receiver. [Tr. p. 88, line 21, and p. 77, lines 15-23.] Appellant had already (February 21 and February 23, 1961) returned $22,000.00 [Tr. p. 88, lines 19-20] of the

$28,000.00 taken on February 20, 1961, and therefore Appellant claims the extra $2,000.00 ($22,000 + $6,000 =$28,000 and Appellant, in paying $8,000.00 on March 1, 1961, had overpaid the $28,000.00 by $2,000.00) as an off-set against the $5,400.00 of rent collected (by Appellant).

The Referee further found that there was no credible evidence of any further (over $30,000.00) payment by Appellant. [Tr. p. 88, lines 21-23.] This Finding is directly contrary (the said District Court disagreed —with the Referee—as to $500) to the only evidence introduced in this record—which clearly established that:

(1) Appellant paid back $1,400.00—which was used to pay utility bills [Ex. N, pp. 18-24];

(2) Appellant paid back $2,199.95—which was also used to pay utility bills. [Ex. N, pp. 18-21, Creditors' Exs. 9 and 12, Ex. M, pp. 136-162 and Exs. I and J.]

[Bankrupt rendered a "utility bill paying service" for its customers—*i.e.,* customers would give Bankrupt money to pay their utility bills and Bankrupt—in turn—would pay the utility company. These customers would clearly be "creditors of the Bankruptcy Estate—if these bills had *not* been paid—Ex. N, pp. 18-24, Ex. M, pp. 136-162.]

The Referee also "found", in effect, that—in any event—these funds ($14,000, $8,000 and $8,000—$2,000 of which we are concerned with at this point) were paid back "before Petition filed" and "creditors of the estate never benefited from such repayment. [Tr. p. 89, lines 3-12.]

The facts are that:

(1) $2,000.00 (of the $8,000) was paid back—and used for "general creditors"—on the day that bankruptcy proceedings were initiated—*i.e.,* March 1, 1961 [Ex. N, p. 21; Rep. Tr. pp. 237-243];

(2) $2,199.95 was repaid—and used for "general creditors"—between March 1 and 16, 1961. [Ex. N. pp. 18-24 and Ex. M, pp. 136-142.]

(3) $1,400.00 was repaid—and used for "general creditors"—between May 16 and 25, 1961. [Ex. N, pp. 18-24.]

(This finding—Tr. p. 89, lines 3-12—is immaterial—even if supported by the facts (which it is not)—because the Referee properly ruled that "any action based on Section 60 (Bankruptcy Act) Preferences" was barred by the two (2) year statute of limitations prescribed by Section 11(e) of the Bankruptcy Act.)

(b) *The $20,000.00 Exchange of Checks.*

On January 26, 1961—five (5) days before Bankrupt (1) started to do business or (2) had any creditors—Appellant caused a corporation (Holmby-Sunset) to deliver a $20,000.00 check to Bankrupt—which cashed the same on January 30, 1961 (the day it commenced to do business).

At the same time, on January 26, 1961, Bankrupt delivered two(2) "post-dated (February 4 and 13, 1961) checks" for $10,000.00 (each) to Appellant—which checks were cashed by Appellant, on February 8, 1961 (February 4 check) and February 20, 1961 (February 13 check). [Tr. p. 86, lines 18-30.]

The only testimony relating to why this exchange of checks occurred was, in substance, that a Steve Dadigan and Appellant were, originally, to become 50% stockholders of Bankrupt and Dadigan was to advance $20,000.00 and Appellant the $42,000.00 (by transferring six—$7,000.00—second trust deeds to McDaniels Market). That Dadigan could not—in the latter part of January, 1961—put up his $20,000.00 and he asked Appellant to "temporarily" advance it for him (until he returned from a trip to Mexico). Appellant did so with the understanding it would be repaid on February 4 ($10,000) and February 13 ($10,000). [Ex. N, pp. 25-29, Ex. M, pp. 46-48, p. 112, Rep. Tr. pp. 46, 48, 136 and 234 and Creditors' Ex. 16.]

Originally [Tr. p. 36, lines 28-32; p. 37, lines 1-18], Appellee sought to recover this $20,000.00—from Appellant—on the theory of a Section 60 Preference—but abandoned this approach when the Referee properly ruled [Rep. Tr. pp. 24-28] that Section 11(e) of the Bankruptcy Act (Act) barred the use of the "Section 60 Preference" approach.

At the Referee's suggestion [Rep. Tr. pp. 28-29], Appellee adopted the "Director's preference" theory and, on September 11, 1963, amended his application. [Tr. pp. 57-62.] On this theory, Appellee contended that he was entitled to the return of this $20,000.00 because Appellant—as the person in control of Bankrupt—did cause a *constructive fraud* to be committed on the *other creditors* of Bankrupt by—in bad faith—having the latter pay Appellant $10,000.00 on February 8, 1961, and February 20, 1961—when Bankrupt was insolvent and Appellant knew (or had reasonable cause to know) that Bankrupt was insolvent (to the detriment of other creditors).

In an attempt to sustain his burden of proving "insolvency"—on February 8 (nine days after business commenced) and on February 20 (21 days after business commenced)—Appellee used a Certified Public Accountant (Thomas Mulherin—called "Accountant"), who orally testified and also prepared a written report. [Rep. Tr. pp. 170-224 and Ex. S.]

Appellee did *not* introduce any evidence which would have established the following:

(a) The fair market value—on February 8 or February 20, 1961—of any of the assets or any of the following specific assets of Bankrupt:

(1) Inventory [Rep. Tr. p. 221, lines 25-26];

(2) Wine and beer license;

(3) Sublease;

(4) Cash—on hand and in a Bank;

(5) Equity in Santa Ana apartment buildings;

(6) Bankrupt's right to purchase McDaniels Market's fixtures, machinery, etc.;

(b) The actual amount of outstanding indebtedness and liabilities on February 8 or February 20, 1961—and how much thereof was "matured" on those days (*i.e.,* for example, the Accountant "determined" [Ex. S, p. 2] a $55,500.00 "loss" in connection with the $60,000.00 note given to Appellant (February 2, 1961) for grant deed to Santa Ana apartments. Assuming, *arguendo,* this note was an "indebtedness", the fact remains that it was *not* "due" or "matured" on either February 8 or February 20, 1961. [Rep. Tr. p. 213, lines 15-23, Ex. M, p. 98, lines 1-10.]

(c) What Bankrupt's "matured" debts were on February 8 and February 20, 1961, and whether Bankrupt had—on those dates—sufficient assets to pay them.

In other words, Appellee introduced no "evidence" to sustain his burden of proving "insolvency"—on February 8 or February 20, 1961—in either the "equity" or "bankruptcy" sense.

The only "evidence" Appellee produced on this issue (*upon which Appellee had the burden of proof*) was the testimony of Accountant. [Rep. Tr. pp. 170-224 and Ex. S, pp. 1-4.]

Appellant points out that Accountant was not qualified—by Appellee—as an appraiser and he admitted [Ex. S, 2nd and 3rd pars. of p. 1) that (a) he couldn't state what the condition of Bankrupt was on the key dates (February 8 and 20, 1961) and (b) he couldn't determine—on those dates—what Bankrupt's "obligations and inventory" were [also see Rep. Tr. pp. 221-224].

As a matter of fact, the Accountant's testimony and conclusions were founded on one "premise", to wit:

That Bankrupt had about a $55,000.00 loss on its "purchase" of the Santa Ana apartments.

[Rep. Tr. p. 224, lines 4-9 and Ex. S, pp. 1-4.]

This testimony (and conclusion) of Accountant ignores all of the following facts:

(1) The Referee had—on July 26, 1962—held that Appellant did *not* "sell" the Santa Ana apartments to Bankrupt, but had made a "capital contribution" thereof to Bankrupt [Tr. p. 30, lines 14-19];

(2) That the only testimony *re* fair market value (and equity) of the Santa Ana apartments—*on February 8 and February 20, 1961*—was the testimony of Appellant that—in his opinion—Bankrupt had an "equity" (over and above the first deed of trust of $25,000.00 and the second deed of trust of $7,000.00) of about $5,000.00 to $6,000.00 in *each* of the six (6) Santa Ana apartment buildings [Rep. Tr. pp. 315-316]. In other words, the only "testimony" in this record (as distinguished from Accountant's statement that Appellee (and Appellee's attorney) told him the "only value to the Bankrupt * * * that could be attributed to the property would be the rents (collected by Bankrupt)"—see Exhibit S, p. 2) was Appellant's testimony that Bankrupt had an "equity" of from $30,000.00 to $36,000.00;

(3) Appellant had "contributed capital" of, at least, $42,000.00 and $30,000.00 (represented by inventory and Santa Ana apartments) *on or about January 11 and February 7, 1961,* respectively, and Bankrupt certainly had "cash" in banks and on hand, it had a beer and wine license, and it had a sublease on both February 8 and February 20, 1961;

(4) No evidence was introduced as to any "indebtedness" of Bankrupt on either February 8 or February 20, 1961, and Appellee disclosed Bankrupt's expenses "through February 20, 1961" only amounted to about $6,700.00 [Ex. S, p. 3];

(5) Appellee disclosed that Bankrupt had a "gross profit" of about $15,500.00 through February

13, 1961, and of about $21,500.00 through February 20, 1961 [Ex. S, p. 4];

(6) Once you treat the $42,000.00 of inventory acquired with Appellant's six trust deeds and the equity in the Santa Ana apartments as "contributions to capital"—as distinguished from indebtedness—[Tr. p. 30, lines 14-26] you couldn't possibly have "insolvency" *in any sense*—on either February 8 or February 20, 1961;

(7) That it is immaterial that the holder of the first deeds of trust—on the Santa Ana apartments—"wiped out" every one at its Trustee's sale *on December 15, 1961* [Rep. Tr. pp. 257-261.]

The record is clear to the effect that Appellant gave a "fair consideration" for this $20,000.00 (*i.e.,* he gave $20,000.00 on January 26, 1961). [Creditor's Ex. No. 16.]

Appellant also points out that Accountant ignored the fact that Bankrupt took an inventory *on February 9, 1961* [Creditor's Ex. 9 and Ex. M, p. 151] and, further, that *on March 6, 1961* (11 days after the Sheriff and Appellee "took over"), Bankrupt still had a "retail" inventory of about $80,000.00 ($57,000.00 wholesale)—*after* the Sheriff had sold $9,000.00 and Appellee had sold $11,000.00 thereof (between February 24 and March 6, 1961) [Ex. S, pp. 8 and 11] and, further, that *on February 28, 1961,* an offer of about $90,000.00 (exclusive of cash, accounts receivable and credits) was made for Bankrupt's inventory, etc. [Tr. pp. 12 and 17-20.]

Appellee introduced no evidence whatsoever to prove:

(1) Insolvency in the bankruptcy sense.

By showing that liabilities—on February 8 and February 20, 1961—exceeded assets—on those same dates;

or

(2) Insolvency in the equity sense.

By showing that—as of February 8 or February 20, 1961—Bankrupt's "current and matured debts" could not—on those dates—be paid with the assets on hand;

(c) *The $28,000.00 withdrawn—by Appellant—on February 20, 1961.*

On February 20, 1961, Appellant withdrew $28,000.00 belonging to Bankrupt.

The only testimony as to why Appellant withdrew this money is that given by Appellant—*i.e.,* that it was done to "protect" bona fide creditors of Bankrupt from a threatened improper attachment—by Steve Dadigan. [Ex. M, pp. 44-45, 66-67, 76-88, Transcript of Dr. Hassen's 21a Examination on July 27, 1961, pp. 35-37.]

There is no conflict in the record (and Appellee admits it and the Referee so "found") that Appellant *returned* this $28,000.00 (plus $2,000.00) on the following dates:

(1) February 21, 1961	$14,000.00
(2) February 23, 1961	$ 8,000.00
(3) March 1, 1961	$ 8,000.00
	$30,000.00

Further, that the $30,000.00 was used to pay "bona fide creditors" of Bankrupt. [Rep. Tr. p. 198, lines 9-12, and pp. 225-243; Ex. M, pp. 136-142; Ex. N, pp. 18-24.]

The referee—with affirmation by the United States District Court—held that Appellant was not entitled to "offset" the "return" of the $28,000.00 because:

(1) It (the withdrawal on February 20, 1961) was a transfer made in violation of the California Uniform Fraudulent Conveyance Act [Tr. p. 90, lines 2-9];

(2) The "return" to Bankrupt ($22,000.00 (on February 21 and 23) direct and $8,000.00 (on March 1, 1961) to its creditors) benefited only creditors of Pomona Properties, Inc. (before bankruptcy) and not "creditors of the bankruptcy estate" (*i.e.,* Sec. 60 preference—which the Referee had previously ruled *not* applicable) [Tr. p. 89, lines 3-10].

Appellant contended (and it is the only evidence as to why the $28,000.00 was withdrawn):

(1) That he withdrew the $28,000.00 to "protect" creditors from a threatened improper and unfounded attachment by Steve Dadigan (President, Director and 50% stockholder of Bankrupt —who "ran" Bankrupt for "two or three weeks" —of its 24-day existence) [Ex. M, pp. 44-45, 66-67 and 76-88 and pp. 35-37 of the Transcipt of Appellant's 21a Examination of July 27, *1961*];

(2) In any event—with Sec. 60 preference theory being barred by Sec. 11(e) of the Act—Appellant having returned $22,000.00—within three

(3) days of the withdrawal—and the remaining $6,000.00 within 11 days of the withdrawal—*and all $28,000.00 being used to pay "bona fide general creditors,"* it was immaterial whether the "February 20, 1961" withdrawal was or was not made in violation of the California Fraudulent Conveyance Act (Sec. 3439, *et seq.* of the California Civil Code).

C. STATEMENT OF THE CASE.

This appeal presents, for the determination of this Court, the following questions:

I.

Did the United States District Court—partially affirming an Order of a Referee in Bankruptcy—err in ruling that Appellant was only entitled to "offset" $1,400.00 (of about $5,599.95) against rents of $5,400.00 (which Appellant admits he improperly collected)?

This was placed in issue by the First Cause of Action of the amended application and Appellant's answer thereto. [Tr. pp. 57-59 and pp. 63-64.]

II.

Did said District Court—affirming an Order of a Referee in Bankruptcy—err in ruling that Appellant had to return $20,000.00 to Bankrupt Estate—on the theory Appellant had committed a constructive fraud on other general creditors of the Bankrupt Estate?

This was placed in issue by the Second Cause of Action of the amended application and Appellant's answer thereto. [Tr. pp. 59-60 and pp. 64-66.]

III.

Did said District Court—affirming an Order of a Referee in Bankruptcy—err in ruling that Appellant had to return—*for a "second" time*—$28,000.00 (withdrawn from Bankrupt's bank account on February 20, 1961] on the theory that the withdrawal was a "fraudulent" transfer within the California Uniform Fraudulent Conveyance Act—even though Appellant returned said $28,000.00 and it was used to pay general creditors of Bankrupt?

This matter was placed in issue by the Third Cause of Action of the amended application and Appellant's answer thereto. [Tr. pp. 60-61 and p. 66 (including "off-set").]

IV.

In any event, did said District Court err in not ruling that Appellant would be entitled to file a claim —as a general creditor—if and when he paid the said $20,000.00 and $28,000.00?

This matter was interjected into the case by the said District Court during the argument before that Court. [Tr. Vol. II, pp. 12-18.]

Appellant contends:

(a) He is entitled to "offset" the $5,599.95 he furnished—to general creditors of Bankrupt (through Jack Goldsmith) *after bankruptcy*—against the $5,400.00 of rents he collected—*after* bankruptcy;

(b) He did not commit any constructive fraud against general creditors of the Bankrupt Estate in cashing the two (2) $10,000.00 checks;

(c) He should not be required to return—*for a second time*—the $28,000.00 he withdrew on February 20, 1961.

D. ASSIGNMENT OF ERRORS.

The Appellant assigns as error the following acts or omissions of the said United States District Court (and the Referee in Bankruptcy):

(1) In ruling that Appellant was not entitled to off-set the entire $5,599.95—Appellant paid (through Jack Goldsmith)—*after* bankruptcy—to general creditors of the Bankrupt Estate—against the $5,400.00 of rents he collected *after* bankruptcy;

(2) In ruling that Appellant committed a constructive fraud—against creditors of Bankrupt Estate—by cashing the two (2) "exchange" checks for $10,000.00 (each);

(3) In ruling Appellant had to return—*for a second time*—the $28,000.00 he withdrew on February 20, 1961, from Bankrupt's bank account;

(4) In ruling that if Appellant returned the $20,000.-00 and $28,000.00 he could file a claim—*within 30 days of the said Court's Order of July 9, 1965*—as a general creditor for the $20,000.00—but not for the $28,000.00.

E. ARGUMENT.

I.

Appellant Was Entitled to an "Off-Set" of $5,599.95 Against the $5,400.00 of Rents Collected by Appellant.

The bankruptcy proceedings herein commenced on March 1, 1961—with the filing of the Petition (Involuntary) in Bankruptcy and appointment of Appellee as Receiver [Tr. p. 77, lines 15-23]. Therefore, Appellant, in this brief, refers to all transactions occurring—on and after March 1, 1961—as occurring "after bankruptcy".

Appellant admittedly collected $5,400.00 of rents—from Santa Ana apartments (deeded to Bankrupt on or about February 7, 1961)—*after* bankruptcy. However, everyone agrees that Appellant returned—*after* bankruptcy—the following:

(a) $2,000.00 (out of $8,000.00) on March 1, 1961;

(b) $1,400.00 between May 16 and 25, 1961 ($900.00 —$400.00—$100.00);

Further, Appellant submits that the uncontradicted evidence, in the record, also discloses that Appellant also returned the following (*between March 1 and 16, 1961*):

$ 644.96
469.20
585.85
500.00
$2,199.95 [Ex. N, pp. 20-21].

Appellant also submits that the uncontradicted (and only evidence) evidence discloses that this $5,599.95 was used to pay "creditors of the estate"—and *after* bankruptcy [Ex. N, pp. 18-24, Ex. M, pp. 136-162, Exs. I and J and Rep. Tr. pp. 240-256].

Appellant is talking about the right of "off-set" of $5,599.95 given, in effect, to Bankrupt—*after* bankruptcy—against $5,400.00 taken, in effect, from Bankrupt—*after* bankruptcy. Thus we are *not* talking strictly about set-offs under Section 68 of the Bankruptcy Act.

See:

Bankruptcy Act, Section 68;

Collier—Bankruptcy Manual—§§68.04, 68.08 and 68.12;

9 Am. Jur. 2d, p. 396 [Bankruptcy §511].

However, as stated in Collier's Bankruptcy Manual, at page 904:

> "The doctrine of subrogation may be implied to permit a set-off, so that a third party who has paid the bankrupt's debt and has taken into his possession property held as security may offset the amount of the debt so paid against the claim of the trustee for the property."

Also see:

In re Rudd, 180 Fed. 312;

9 Am. Jur. 2d, p. 397 [Bankruptcy §512];

44 Cal. Jur. 2d, p. 634;

In re Field Heating & Ventilating Co., 201 F. 2d 316 (CCA-7).

Appellant submits there is no difference between the $900.00 (allowed by the Referee as a set-off) or the $1,400.00 (allowed by said District Court as a set-off) and the entire $5,599.95 (of which said $900.00 or $1,400.00 are a part) which Appellant is claiming as a set-off.

II.

Appellant Did Not Commit Any Constructive Fraud — Against General Creditors of the Bankruptcy — by Cashing the Two (2) $10,000.00 Exchange Checks.

At the outset Appellant points out that Appellee was forced to amend his application (involved herein) to, in effect, plead a "director's preference" within the alleged purview of cases like *Bonney v. Tilley,* 109 Cal. 346, and *T.I.T. Co. v. Calif. Develop. Co.,* 171 Cal. 173, because:

I. Sec. 11(e) of the Bankruptcy Act barred any recovery—under the theory of "preference"—under Sec. 60 of the Bankruptcy Act; and

II. No recovery could be had under Sec. 67(d) of the Bankruptcy Act or the California Uniform Fraudulent Conveyance Act (Sec. 3439, *et seq.*, of the California Civil Code) because:

(a) Appellant has paid a 100% consideration (let alone a "fair consideration") for these two (2) $10,000.00 checks; and

(b) Appellant had caused the checks to be issued on January 26, 1961—five (5) days before Bankrupt commenced business (on January 30, 1961) or had *any* creditors.

Faced with this situation, Appellee—at, we respectfully submit, the Referee's suggestion—turned to Section 70 of the Bankruptcy Act and adopted a new theory of "constructive fraud" under California law, to wit:

The Referee, having ruled—on July 26, *1962* (about 14 months before application amended and in connection with hearings on Appellee's objections to Appellant's claims)—that Appellant was "the person in control of Bankrupt", properly accepted that ruling as binding on the parties herein (*res adjudicata* or collateral estoppel).

Therefore, Appellee plead (by amended application of 9/11/*63*) that Appellant—as the dominant person in control of Bankrupt—committed a "constructive fraud" on other general creditors of the estate by having his two (2) "10,000.00 exchange checks" paid—on February, 8, 1961, and February 20, 1961—at a time when

Bankrupt was allegedly "insolvent" and to the detriment of such creditors.

Appellant, by his answer [Tr. pp. 64-65], in effect, contended:

(a) The exchange of checks occurred on January 26, 1961 (before Bankrupt had commenced business and before it had *any* creditors) and, in entire good faith, as an accommodation to Bankrupt—pending Steve Dadigan putting up this $20,000.00;

(b) In any event, Bankrupt was *not* insolvent on February 8 and February 20, 1961—when the two (2) $10,000.00 checks were cashed.

Under the uncontradicted facts hereinbefore set forth, there can be no question as to the circumstances surrounding the execution of the two (2) $10,000.00 checks. Further, the record is uncontradicted as to the following receipts by Appellant (from Bankrupt's funds) and the following payments by Appellant—to or for the benefit of Bankrupt (or its creditors):

Amount Received by Dr. Hassen	Date	Amount Given by Dr. Hassen	Date
		$20,000.00	1-26-61
		42,000.00	Prior to 1-30-61
$10,000.00	2-8-61		
10,000.00	2-20-61		
28,000.00	2-20-61		
		14,000.00	2-21-61
		8,000.00	2-23-61
		8,008.67	3-1-61
		2,199.95	3-1-61
			3-16-61

$5,400.00 (rents) May-July, 1961

In other words—and without taking into consideration the order involved herein (requiring Dr. Hassen to return an additional $52,500.00), we find that Dr. Hassen has already contributed about $94,200.00 (for the benefit of Bankrupt's creditors), while—in the manner hereinabove set forth—he has withdrawn $53,400.00.

If the Referee's Order of December 11, 1964, is allowed to stand, Dr. Hassen would be $94,000.00 net out of pocket ($146,700-$53,400.00).

Appellant respectfully submits that the facts of this case are a "far cry" from the facts presented to the Court in the *Bonney* and *T.I.T. Co.* cases, *supra,* to wit:

1. In both of said cases the corporation involved was clearly "insolvent" and the "controller" knew it was insolvent;

2. In the *Bonney* case, a director bought up corporate obligations at 10c on the dollar and then tried to collect 100% of face value "to the detriment of other creditors". EVEN IN THAT CASE, THE COURT ALLOWED THE DIRECTOR TO SHARE "PRO RATA" WITH THE OTHER CREDITORS;

3. In the *Title Insurance and Trust Company* case, a railroad company went into Mexico and "fraudulently" had a "collusive judgment" entered in favor of one of its *100%* subsidiaries against another one of its *100%* subsidiaries. Even in that case the Court again held that the railroad company had the right to share "pro rata" with other creditors of California Development Company.

In our case, we do not have "insolvency" on either February 8 or February 20, 1961 (the dates of cashing of checks) and, in addition, Dr. Hassen paid 100% for his two $10,000.00 checks ($20,000.00). Secondly, the circumstances under which the said checks were exchanged are a far cry from the facts of *Bonney* or *Title Insurance and Trust Company.*

In any event, Appellee has *not* established that Bankrupt *was insolvent* on either of two days when these $10,000.00 checks were cashed—*i.e., on February 8 or February 20, 1961.*

In both the *Bonney* and *T.I.T. Co.* cases, *supra,* the "person" in control of the debtor corporation *acting in bad faith*—knowing that the debtor corporation (involved in those cases) was hopelessly insolvent—entered into a course of conduct that "he" knew would be to the detriment of the bona fide creditors and for his "sole" benefit.

Let us compare the present case with those cases:

On January 26, 1961—and as a temporary advance under circumstances that can only indicate *good* faith—Appellant caused Holmby-Sunset to advance $20,000.00 and, in turn, took back two (2) $10,000.00 checks—post-dated about one week (2/4) and two weeks (2/13).

Appellant had already furnished Bankrupt the equivalent of $42,000.00 in cash (*i.e.,* six trust deeds used to pay for $42,000.00 of $55,000.00 of McDaniel Market inventory—Creditors' Exhibit No. 6, Exhibit M, p. 151) (in other words, the only "working capital" Bankrupt had was the $62,000.00 thus furnished by Appellant [Tr. p. 11, pp. 15-24]).

On February 9, 1961 (one day after first $10,000.00 exchange check cashed), an inventory was taken disclosing about $50,000.00 of inventory on hand [Creditors' Ex. 7 and Ex. M, p. 151].

According to Exhibit S, pp. 3-4, the Bankrupt realized the following "gross profits" from sales:

(a) Through February 4, 1961—$6,331.00

(b) Through February 13, 1961—$15,595.00

(c) Through February 20, 1961—$21,579.00

On *February 24,* 1961, the Bankrupt was "taken over" by the Sheriff (because of an attachment) and *the Appellee* "took over" from the Sheriff on March 1, 1961.

Between February 24 and February 28, 1961, the "Sheriff" sold about $9,200.00 of "inventory" [Ex. S, p. 8] and *the Appellee* sold $11,337.19 of "inventory" between March 1 and March 6, 1961 [Ex. S, p. 11].

However, *on March 6, 1961,* the Appellee still had, in his possession and control, $80,000.00 (at retail)—$57,000.00 at wholesale—*of inventory* (in addition, he had sublease, beer and wine license, cash, accounts receivable, credits, etc.).

On February 28, 1961, a Mr. Hirata offered [Tr. pp. 17-19] the equivalent of $90,000.00 *to Pomona Properties, Inc.* for "its business".

Bearing in mind there has been "no evidence" offered by Appellee—in support of its burden of proving insolvency (9 Am. Jur. 2d p. 783 (Bankruptcy §1055)) in the "equity" sense—*i.e.,* Bankrupt could not on February 8, 1961 (tenth day of operation) and February 20. 1961 (20th day of operation) pay its "*current* obliga-

tions as they became due"—Appellant respectfully submits that there is *no evidence* to support the Referee's finding that—*on February 8 and February 20, 1961*—"Appellant knew and had reasonable cause to believe the Bankrupt was insolvent" [Tr. p. 87, lines 20-22].

The foregoing facts would—Appellant respectfully submits—indicate to any 'reasonable person" *on February 8 and February 20, 1961* that Pomona Properties, Inc. (now Bankrupt) was "solvent"—let alone to have "reasonable cause to believe the Bankrupt was insolvent".

Appellant—the uncontradicted evidence discloses:

(a) Acted in entire "good faith" in exchanging these checks [Ex. N, pp. 25-29, 32; Rep. Tr. pp. 46 and 48, 136; Ex. M, pp. 124-128];

(b) Knew that there weren't *any* creditors on January 26, 1961 (when checks "exchanged");

(c) On February 8 and February 20, 1961—when checks cashed—had no reason—under the foregoing facts—to believe that Pomona Properties, Inc. was "insolvent" in any "sense" of the word.

To the contrary, the foregoing evidence clearly indicates—Appellant respectfully submits—that *if* the other creditors of Pomona Properties, Inc. had been "reasonably patient" they would have avoided a "distressed or forced sale" and been paid 100¢ on the dollar [Rep. Tr. pp. 48-53].

See:

Cowan's—Bankruptcy Law and Practice—§751, pp. 397-398 (and cases in footnote).

In spite of the quantities of inventory on hand (plus cash, sublease, beer and wine license, accounts receiv-

able, etc.), the Appellee finally realized—at a "distress or forced sale"—only about $27,500.00 on July 12, 1961 [Tr. p. 23, lines 3-9]. *Query?* What happened to the approximately $57,600.00 of *wholesale* inventory of March 6, 1961 [Ex. S, p. 11]?

Let us now analyze the finding of the Referee that Pomona Properties, Inc. was insolvent on February 8 and on February 20, 1961 [Tr. p. 86, line 32, and p. 87, lines 1-18].

The Court will note that the Referee "found" *insolvency* as defined by the Bankruptcy Act (§§1(19) and 67(d)(1)(d)) and the California Uniform Fraudulent Conveyance Act (Sec. 3439, *et seq.* of the California Civil Code—specifically Sec. 3439.02(a)).

Thus our problem is to determine whether Pomona Properties, Inc.—*on either February 8 or February 20, 1961*—(1) was in the position that its liabilities exceeded the fair "market or saleable" value of its assets or (2) whether the fair saleable or market value of its assets was not sufficient to pay its *current matured* debts.

Appellant believes that the former question presents "insolvency" in the "bankruptcy sense" and the latter presents it in the "equity sense".

See:

Cowan—Bankruptcy Law and Practice—p. 25 (§25);

9 Am. Jur. 2d, "Bankruptcy" §§1065, 1066 and 1113.

Inasmuch as Appellee—with the burden of proving "insolvency" (9 Am. Jur. 2d, Bankruptcy §1055, pp. 783-784 and §§1185-1187, pp. 880-882)—*did not at-*

tempt to introduce any evidence as to whether Pomona Properties, Inc. was "insolvent" in the *equity* sense (*i.e.,* could not pay its *current mature* bills on February 8 and February 20, 1961), we are concerned here only with Appellee's attempt to prove "insolvency" in the "bankruptcy sense" (*i.e,* balance sheet test of assets vs. liabilities)—on February 8, 1961, and on February 20, 1961.

Appellee relied entirely upon the testimony and report of a Mr. Mulherin (called "Accountant")—a Certified Public Accountant.

Appellee did *not* introduce *any* evidence of the "fair-market value" or "fair saleable value" of the assets of Pomona Properties, Inc. on February 8 or February 20, 1961—with the exception that:

(a) He did introduce evidence that Pomona Properties, Inc. did have from $30,000.00 to $36,000.00 of equity—on February 8 and February 20, 1961 —in the Santa Ana apartment buildings [Rep. Tr. pp. 315-316];

(b) Over objection of Appellant [Rep. Tr. pp. 257-261], Appellee did introduce documents referring to a "liquidation sale" (nine or ten months *after bankruptcy*) by the Trustee of the *first deeds of trust* on the Santa Ana apartment buildings [Ex. GG].

Appellee introduced *no evidence* as to the fair market value or fair saleable value of the following specific assets of Pomona Properties, Inc.—on February 8 or February 20, 1961:

1. Cash—on hand and in banks:
2. Inventory;

3. Sublease;
4. Accounts receivable;
5. Credits;
6. Option to purchase (from McDaniel Markets) fixtures, equipment and machinery;
7. Beer and wine license.

On the other hand, Appellee introduced *no evidence* as to amount, type or kind of current, mature liabilities (or any other type of liabilities) of Pomona Properties, Inc.—on February 8 and February 20, 1961—other than:

(a) Reference was made to February 2, 1961, promissory note of $60,000.00 and the January 11, 1961, promissory note for $42,000.00 [Creditors' Exs. 1 and 2; Ex. M, pp. 61-62];

(b) A report of Accountant was introduced as Ex. S—which referred to "alleged" losses and expenses—but did *not* refer to any liabilities.

There was *no evidence* introduced that Appellant had —on either February 8 or February 20, 1961—made a "demand" for payment of either of said promissory notes. To the contrary, Appellant testified that the $60,000.00 note was "only to be paid when Pomona Properties, Inc. could pay same." [Ex. M, p. 98, lines 1-10].

Furthermore, Appellee has overlooked the fact that the $60,000.00 was really not an obligation (or liability) *on February 8 or February 20, 1961,* because:

The Referee found (*7/26/62*) that the $60,000.00 and $42,000.00 were "contributions of capital" [Tr. p. 30, lines 14-26] and did not arise out of a sale or loan, respectively, to Pomona Properties, Inc.

See:

9 Am. Jur. 2d, Bankruptcy, Sec. 1189, pp. 883-884;

[Rep. Tr. p. 5, lines 3-18].

The "foundation" of the unqualified conclusion given by the Accountant herein is the erroneous premise that Bankrupt had—on February 8 and February 20, 1961—a $55,500.00 "loss" in connection with its purchase of Appellant's "equity" in the Santa Ana apartments [Ex. S, pp. 1-2, and Rep. Tr. p. 214, line 25, to p. 224, line 9].

A mere reading of Exhibit S [pp. 1-4] and the Accountant's testimony [Rep. Tr. pp. 59-71, 138-224] will disclose that—although he understood that "excess of liabilities over assets" indicated "insolvency" [Rep. Tr. p. 65, lines 16-23], the Accountant never actually made any attempt to *even list* the assts and liabilities (as of February 8 and February 20, 1961—let alone attempt to fix their amounts.

The Court will recall that Pomona Properties, Inc.—at all times up to March 6, 1961 (six (6) days *after* bankruptcy) had very substantial "assets"—to wit:

(a) Cash—in banks and on hand (we know there was, at least, $28,000 on February 20, 1961—*i.e.*, Appellant obtained $28,000 on February 28, 1961);

(b) Inventory ($80,000 at retail, *as late* as March 6, 1961—*after Sheriff sold $9,200 and Appellee had sold $11,000;*

(c) Equity in Santa Ana apartments (Appellant testified from $30,000 to $36,000):

(d) Beer and wine license;

(e) Option to purchase fixtures, etc.;

(f) Lease and sublease;

(g) Accounts receivable;

(h) Credits.

(Even *after* the Sheriff "took over" on February 24, 1961, Hirata offered about $90,000.00 for everything "except cash, accounts receivable and credits" [Tr. pp. 17-19].)

Therefore, Appellant respectfully submits that Appellee did *not* bring himself within the purview of the doctrine of the *Bonney* and *T.I.T. Co.* cases, *supra,* in that:

(a) The "exchange of checks"—and the cashing thereof on February 8 and February 20, 1961—took place under circumstances that indicated "complete good faith" on the part of Appellant;

(b) Appellant paid a 100% (let alone a fair consideration) consideration for the two (2) $10,000.00 checks;

(c) Appellant had no reason to believe—and no evidence was introduced to show Appellant so knew or had cause to so believe—(on February 8 or February 20, 1961) that Pomona Properties, Inc. was "insolvent" because

(d) Pomona Properties, Inc. was *not* insolvent—on those dates—and *no evidence* was introduced in any attempt to so prove such insolvency.

Appellant respectfully submits that the orders—requiring return of the said $20,000.00—should be reversed.

III.

Appellant Should Not Be Required to Return—for a Second Time—the $28,000.00 He Withdrew on February 20, 1961.

The record herein is clear as to the following:

(1) Appellant withdrew $28,000.00 on February 28, 1961, from Bankrupt's bank account;

(2) Appellant repaid said $28,000.00 as follows:

$14,000.00—February 21, 1961
$ 8,000.00—February 23, 1961
$ 8,000.00—March 1, 1961
[Tr. p. 74, lines 2-9, p. 88, lines 13-21].

The Appellee—as aforesaid—first attempted to recover this $28,000.00—*for a second time*—on the theory of a Section 60 preference. When the Referee properly ruled that "preference recovery actions" were barred by the provisions of Section 11(e) of the Bankruptcy Act, Appellee proceeded on a theory that Appellant —frankly—does not understand (*i.e.*) that the withdrawal—on February 20, 1961—constituted a fraudulent "transfer" within the purview of Sections 3439, *et seq.* of the California Civil Code.

We may assume, *arguendo,* that the "withdrawal" constituted such a "transfer" and—*if it had not been repaid* (as aforesaid)—Appellee could have proceeded for recovery under either 67(d) of the Bankruptcy Act or said 3439, *et seq.*, of the California Civil Code.

However, Appellant did repay the $28,000.00 (plus $2,000.00)—within ten days of withdrawal—and the repayments were used to pay "bona fide creditors". (It is true that Appellee—or "creditors of estate"—[Tr. p. 89, lines 3-10]—did *not* receive this $30,000.00,

but that is not material because a "Sec. 60 preference action" was not commenced within two (2) years of adjudication).

The Referee—with the said District Court affirming —*relying upon Section 3439.07 of the California Civil Code,* concluded that Appellant had to return the $28,000.00 *for a second time* [Tr. p. 90, lines 11-15].

The Referee—with the said District Court affirming —also said that the *original (or first)* return of the $28,000.00—by Appellant—was immaterial, citing:

23 Cal. Jur. 2d, p. 545, note 14 (1964 Supp.);

Hickson v. Thielman, 147 Cal. App. 2d 11, 304 P. 2d 122;

[Tr. p. 74, lines 2-18].

Appellant respectfully submits that the citations (relied upon by the Referee, *supra,* merely hold:

(1) If a transferee (receiving a "fraudulent transfer") merely transfers the same back to *his transferor (without any benefit to transferor's creditors), then,* and only then, is he not relieved of his liability (under the California Fraudulent Conveyance Act).

However, *if* such a "transferee" returns the "transfer" to the creditors (or for their benefit)—*as happened in the present case*—then the "transferee" has no further liability to "creditors of the transferor".

See:

Hickson v. Thielman, 147 Cal. App. 2d 11, 304 P. 2d 122;

23 Cal. Jur. 2d, pp. 540-545 (§§ 94-100):

Sec. 68(a), Bankruptcy Act.

We have—up to this point—been assuming, *arguendo,* that Appellant withdrew the $28,000.00 "with intent to delay, etc., creditors"—as found by the Referee [Tr. p. 88, lines 13-18]. However, we again refer to the uncontradicted evidence, in this record, to the effect that Appellant withdrew the $28,000.00—on February 20, 1961—to "protect" bona fide creditors of Bankrupt and to defeat Steve Dadigan's *threatened improper* "attachment" [Ex. M, pp. 76-78].

(In addition, we call the Court's attention to the inferences that must be drawn from the fact that on February 21, 1961, Appellant returned $14,000.00, on February 23, 1961, he returned $8,000.00 and $8,000.00 was returned on March 1, 1961—all of which was used to pay "Creditors".)

Appellant respectfully submits that he should not—under these circumstances—be required to return the $28,000.00 "for a *second* time".

IV.

In Any Event, Appellant Is Entitled to File a Claim—as a General Creditor—if He Is Required to Return the $20,000.00 and $28,000.00.

The Referee—in directing the return of the said $20,000.00 and $28,000.00—was silent *re* Appellant's right—if such return was made—to file a claim as a general creditor [Tr. p. 89, lines 26-32 and p. 90]. However, the United States District Court—in its order of affirmance—ruled that Appellant could file as a general creditor (if he returned *the $20,000.00*—but not the $28,000.00), *provided* the $20,000.00 was paid *within 30 days of July 9, 1965* [Tr. p. 125, lines 2-8].

(We note that the Hon. William M. Byrne did not —at the June 29, 1965, hearing—refer to any "30-day period" [Tr. Vol. II, pp. 12-18].

Appellant submits that *if* (contrary to Appellant's position herein) the Court should affirm the order to return the $20,000.00 and/or the return of the $28,-000.00, then, and in that event only, Appellant should be allowed—within 30 days after finality of ruling of this Court—to pay such amounts and file a claim—as a general creditor—for the entire amounts so paid.

See: 9 Am. Jur. 2d (Bankruptcy, §454), p. 353.

Conclusion.

Appellant respectfully submits the Order of July 9, 1965, of the said United States District Court—and the Order of the Referee of December 11, 1964, which it basically affirmed—should be reversed.

Dated: November 29, 1965.

Respectfully submitted,

JAMES J. ARDITTO,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JAMES J. ARDITTO,
Attorney for Appellant.

APPENDIX.

List of Exhibits* as Required by Rule 18(f).

Exhibit No.	Description	Source of Exhibit
1	$42,000.00 check (used to pay for inventory)	Exh. M, p. 61 & Rep. Tr. p. 36
2	$60,000.00 check issued to Appellant	Exh. M, p. 61 & Rep. Tr. p. 36
3	Letter to Steve Dadigan	Exh. M, p. 65 & Rep. Tr. p. 36
4	Grant Deed of 2-7-61	Exh. M, p. 74 & Rep. Tr. p. 36
5	Stock book of Pomona Properties, Inc.	Exh. M, p. 120 & Rep. Tr. p. 36
6	Inventory of McDaniels Markets as of 1-29-61	Exh. M, p. 151 & Rep. Tr. p. 36
7	Inventory of Pomona Properties, Inc. as of 2-9-61	Exh. M, p. 151 & Rep. Tr. p. 36
8	Pomona Properties, Inc. Minute Book	Exh. M, p. 165 & Rep. Tr. p. 36
9	Bank statement of Jack Goldsmith in City National Bank—with attached checks	Exh. N, p. 24 & Rep. Tr. p. 36
10	Holmby-Sunset check of 1-26-61 for $20,000.00	Exh. N, p. 27 & Rep. Tr. p. 36
11	Check of Appellant, dated November 24, 1959, for $5,000.00 and check for $3,000.00 dated November 30, 1959	Exh. N, p. 37 & Rep. Tr. p. 36
12	Bank statements and cancelled checks of Jack Goldsmith (d/b/a Santa Ana Properties)	Exh. N, p. 41 & Rep. Tr. p. 36
13	Seven checks for $2,000.00	Rep. Tr. p. 228
14	Four cashier's checks (totaling $8,000.00), together with deposit slip and bank statement	Rep. Tr. p. 229
15	Jack Goldsmith's bank ledger sheet	Rep. Tr. p. 232
16	Cashier's check—Southwest Bank—for $20,000.00 dated 1-30-61	Rep. Tr. p. 234
17	Letter of 2-10-61 from Steve Dadigan	Rep. Tr. p. 244

*Creditors' (or Appellant's) exhibits are "numerals" and Trustee's Exhibits are "letters of the alphabet".

Exhibit No.	Description	Source of Exhibit
18	Petition of 4-10-61 (by reference) for authority to confirm sale	Rep. Tr. p. 312
19	Supplemental petition to confirm sale, filed 6-21-61	Rep. Tr. p. 312
20	Order confirming Trustee's sale, filed 6-21-61	Rep. Tr. p. 312
21	All creditors' claims filed with Trustee (by reference)	Rep. Tr. p. 359
A	Escrow #1929 (5 pages) — between Pomona Properties, Inc. and McDaniels Market	Exh. M, p. 33 & Rep. Tr. p. 36
B	Financial statement of Appellant—dated 1-5-61	Exh. M, p. 51 & Rep. Tr. p. 36
C	City National Bank ledger sheets (2)	Exh. M, p. 89 & Rep. Tr. p. 36
D	Pomona Properties check for $13,287.-91 (payable to McDaniels Market)	Exh. M, p. 93 & Rep. Tr. p. 36
E	Grant Deed to Santa Ana Apartments from Corenson to Vinemore Company	Exh. M, p. 96 & Rep. Tr. p. 36
F	Check No. 1060 for $1,000.00	Exh. M, p. 114 & Rep. Tr. p. 36
G	Check for $10,000.00	Exh. M, p. 117 & Rep. Tr. p. 36
H	Check for $10,000.00	Exh. M, p. 117 & Rep. Tr. p. 36
I	Jack Goldsmith report on Bankrupt	Exh. M, p. 161 & Rep. Tr. p. 36
J	List of creditors filed April 13, 1961 (by Jack Goldsmith)—by reference	Exh. M, p. 163 & Rep. Tr. p. 36
K	Letter dated November 2, 1961, to Jack Goldsmith	Exh. N, p. 15 & Rep. Tr. p. 36
L	Schedules A and B and Statement of Affairs—by reference	Exh. N, p. 60 & Rep. Tr. p. 36
M	Transcript of hearings on February 6 and March 1, 1962, re objections to claims of Appellant—by reference	Rep. Tr. p. 39
N	Transcript of hearings of May 7 and May 8, 1962, on objections to claims of Appellant—by reference	Rep. Tr. p. 39
O	Findings of Fact and Conclusions of Law dated 7-26-62—by reference	Rep. Tr. p. 39
P	Order dated July 26, 1962 (re claims of Appellant)	Rep. Tr. p. 39

Exhibit No.	Description	Source of Exhibit
Q	Record of sales of bankrupt	Rep. Tr. p. 152
R	Daily record of Pomona Properties, Inc. through 2-25-61	Rep. Tr. p. 162
S	Report, dated 10-17-63, of Accountant (M. T. Mulherin)	Rep. Tr. p. 168
T	Southwest Bank check book of Bankrupt	Rep. Tr. p. 181
U	Bank statements of Bankrupt (Southwest Bank)—5 pages	Rep. Tr. p. 181
V	Checks on Southwest Bank by Bankrupt, deposit receipts and signature card	Rep. Tr. p. 181
W	Bankrupt's bank book from Southwest Bank	Rep. Tr. p. 182
X	Bankrupt's bank book on City National Bank	Rep. Tr. p. 183
Y	3 ledger sheets—of Bankrupt—from City National Bank	Rep. Tr. p. 183
Z	12 pages of City National Bank statements (Jack Goldsmith account)	Rep. Tr. p. 184
AA	Checks drawn on City National Bank	Rep. Tr. p. 185
BB	City National Bank checks drawn on Bankrupt's account	Rep. Tr. p. 185
CC	Miscellaneous bank records of Bankrupt	Rep. Tr. p. 186
DD	Bank book—of Bankrupt—from City National Bank	Rep. Tr. p. 186
EE	Letter from McDaniel's Markets re Escrow #1929	Rep. Tr. p. 202
FF	March 6, 1961, inventory of Bankrupt	Rep. Tr. p. 206
GG (1-6)	6 documents pertaining to sale of Santa Ana apartments by holder of first deed of trust	Rep. Tr. p. 260
HH	Summary of testimony of Accountant Mulherin	Rep. Tr. p. 329